February 20, 1950

Henry F. Lesem, Supervisor
Arizona State Tuberculosis Sanatorium
Tempe, Arizona

Dear Mr. Lesem:

We have had under consideration your request for an opinion dated December 15, 1949. We regret our delay in advising you.

You state your problem is this: An employee working in your kitchen, at the time of his original employment showed no signs of active tuberculosis, although he had worked in an anthracite coal mine, and had received disability compensation from a Miners' Union. In the course of your usual periodic check-ups on all employees, you discovered positive evidence of active tuberculosis in the employee in question after he had been in your employment some months. Your question is whether under such circumstances, tuberculosis is within the classification of an occupational disease, even though not specifically named in the law and, whether, if so, it is compensable.

It is our opinion that, under the present law of Arizona, the case which you present is not one for which compensation can be awarded under the Arizona Occupational Disease Disability Law (Sections 56-1201 through 56-1262 ACA 1939, as added by Chapter 26, Laws 1943) and that tuberculosis cannot be considered in such case an occupational disease.

The Supreme Court of Arizona in Industrial Commission v. Frohmiller, 60 Ariz. 464, 140 P. 2d 219, upheld the constitutionality of the Arizona Occupational Disease Disability Law and expressed the rule that "There was no common law right of action for occupational disease, the first recognition of the right to relief therefrom (In Arizona) being that created by the enactment of Chapter 26 of the Laws of 1943". The measure and extent of the right to compensation for disability arising from an alleged occupational disease in this State thus becomes the Occupational Disease Disability Law itself. Such right exists in any particular case only if it can be found within the terms of said law. The selfsame principle governs as to the Workmen's Compensation Law, our Court stating:

> " * * * The right to compensation did not exist at common law but is one of purely statutory creation. The court therefore must look to the terms of the act itself to determine whether the right to it exists in any given case, and, if it does not, the only alternative it has is to say so, even though, as in this instance, it seemingly has the effect of defeating one of the purposes of the law. * * * " Proops v. Twohey Bros., 29 Ariz. 164, 240 P. 277.

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Section 56-1213 of the Occupational Disease Disabiliyy Law concerns liability and compensation thereunder, and reads in part:

> "(a) There is imposed upon every employer a liability for the payment of compensation to every employee who shall not have rejected the provisions of this act as herein provided and who becomes totally disabled by reason of an occupational disease arising out of his employment, subject to the following conditions: * * * " (Emphasis supplied.)

("Employee" is defined in Section 56-1211 to include "every person in the service of the state".) Subsequent sections provide for the insurance by employers of payment of such compensation with the State Occupational Disease Compensation Fund. Section 56-1235 provides:

> "Occupational diseases--Proximate causation.--The occupational diseases hereinafter defined shall be deemed to arise out of the employment, only if there is a direct casual connection between the conditions under which the work is performed and the occupational disease, and which can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as the proximate cause, and which does not come from a hazard to which workmen would have been equally exposed outside of the employment. The disease must be incidental to the character of the business and not independent of the relation of employer and employee. The disease need not have been foreseen or expected but after its contraction must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a natural consequence." (Emphasis supplied)

Section 56-1236 enumerates 36 "classes" of occupational diseases, the section beginning:

> "For the purposes of this act only the diseases enumerated in this section shall be deemed to be occupational diseases: * * "

The enumeration does not include tuberculosis and the conclusion is inescapable that it is not an occupational disease within the

coverage of the Occupational Disease Disability Law. In cases of disability or death from silicosis or asbestosis (both specifically enumerated in Section 56-1236, supra) complicated with tuberculosis of the lungs, Section 56-1237 provides that compensation shall be payable as for disability or death from uncomplicated silicosis or asbestosis. Such was the fact situation in Utah Construction Co. v. Berg, 68 Ariz. 285, 205 P. 2d 367. Provision is made in Section 56-1255 for reduction of compensation in cases where an occupational disease is aggravated by any other disease or infirmity not itself compensable or where disability or death from any other cause not itself compensable is aggravated, prolonged, accelerated or in any wise contributed to by an occupational disease. These provisions, however, do not effect our conclusion in the instant case. It might further be noted that Section 56-1214 provides that where compensation is payable for an occupational disease under the Arizona law the only employer liable is the employer in whose employment the employee was last injuriously exposed to the hazards of such disease.

Several cases from other jurisdictions though deciding under varying factual situations and statutory provisions have considered the general question of tuberculosis as an occupational disease. They are generally in accord that tuberculosis is not an occupational disease. The case of most particular interest because of factual similarity is State ex rel. Cashman v. Sims, (W.Va. 1947) 43 SE 2d 805, 172 ALR 1389, wherein a doctor employed at a state sanatorium for the care of tubercular patients was stricken with pulmonary tuberculosis and became disabled. It was held under somewhat different statutory provisions that the disability was not compensable and that tuberculosis is not an occupational disease. The case contains an interesting discussion of the subject. Also see:

Madeo v. I. Debner & Bros., 121 Conn. 664, 186 A. 616, 105 ALR 1408

Western Foundry Co. v. Inds. Comm., 384 Ill. 420, 51 NE 2d 466

Bolosino v. Laclede-Christie Clay Products Co. (Mo. Appeals) 124 SW 2d 581

But see: Bishop v. Comer & Pollock, 251 App. Div. 492, 297 NYS 946.

We are not here concerned with a situation wherein there was an accidental injury arising out of and in the course of employment so as to call for recourse to the Workmen's Compensation Law.

We reiterate our conclusion in particular relation to the present facts that the Arizona Occupational Disease Disability Law as it now reads precludes compensation for tuberculosis as an occupational disease.

FRED O. WILSON
Attorney General

RICHARD C. BRINEY
Assistant Attorney General